IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 2438 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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SONA D/O HARSHADRAI V SHAH W/O RAHUL A SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 2438 of 2000

MR AD SHAH for Petitioner No. 1-3

Mr. N.D. Gohil, APP for Respondent No. 1

MR KB ANANDJIWALA for Respondent No. 2

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 26/04/2002

C.A.V. JUDGEMENT

1. Original accused Nos. 3 to 5 of Criminal Case No.4219 of 1998 pending in the Court of the learned Chief Judicial Magistrate, Rajkot, for the offence punishable

under Section 138 of the Negotiable Instrument Act, 1881 ('Act' for short), have filed this application under Section 482 of the Code of Criminal Procedure ('Code' for short), to quash the order dated August 19, 1998 passed by the learned Judicial Magistrate (First Class), Rajkot, issuing summons against them in the abovereferred criminal case.

2. The respondent No.2 has filed the aforesaid complaint against the petitioners and other accused persons, inter alia, stating that, because of the good relations with the petitioners and other accused persons, to help them in their business, he had advanced a loan of Rs.2 lakhs by cheque No.2002582 dated May 2, 1998. It is alleged that the accused persons had paid an amount of Rs.5355/- towards interest by cheque No.047554 dated March 27, 1998. It was further alleged that by cheque No.47556 dated May 9, 1998, the accused persons had given cheque for Rs.2,04,095/- which consisted of the loan amount of Rs.2 lakhs and Rs.4095 towards interest. The complainant has stated that the said cheque was deposited in the Bharat Overseas Bank Limited, Dhebar Road, Rajkot, which was returned with endorsements 'payment stopped by the drawer' and 'exceeds the arrangement' on June 18, 1998. The complainant through his advocate sent registered notices on June 20, 1998 to all the accused persons to pay the amount of cheque within 15 days. The said notices were returned on June 22, 1998 with an endorsement 'unclaimed'. The complainant lodged the aforesaid criminal complaint in the Court of the learned Chief Judicial Magistrate, Rajkot, against the accused persons for the offence punishable under Section 138 of the Act. The learned Judicial Magistrate, First Class, Rajkot, after verifying the contents of the complaint, examined the complainant on July 22, 1998 and ordered enquiry under Section 202 of the Code. The learned Judicial Magistrate, First Class, Rajkot, by his order dated August 19, 1998 , having satisfied that the complaint disclosed the ingredients of offence under Section 138 of the Act, issued summons making it returnable on September 21, 1998, which has been challenged by the petitioners, who are accused Nos. 3 to 5, by filing this Misc. Criminal Application under Section 482 of the Code.

3. Learned advocate for the petitioners, Mr. A.D. Shah, has vehemently submitted that the complaint does not disclose ingredients of the offence. He has submitted that a person other than the Company can be prosecuted if he was in-charge of and responsible to the conduct of the business of the Company. It is further

submitted that the complaint should fulfill the ingredients of the provisions under Section 141 of the Act. It is vehemently submitted that, if the allegations in the complaint do not, in express words, make out a case that the petitioners were in-charge of the Company [namely, M/s. Mona Chemicals-accused No.1] at the time of commission of the offence, the criminal proceedings against them should be quashed. In support of the submission, the learned advocate for the petitioners has placed reliance on the decision of the Apex Court in the case of K.P.G. Nair vs. M/s. Jindal Menthol India Limited, reported in 2001 SCCrR 27.

4. On the other hand, the learned advocate for the respondent No.2 has submitted that the petitioners have not come with clean hands before this Court and they have suppressed the fact that, earlier, the same petitioners along with the Company had filed an application in the Court of the learned Judicial Magistrate (First Class), Rajkot, for dropping of the proceedings under Section 245(2) of the Code. The respondent No.2, original complainant, by filing affidavit to the present application, has brought on record the said facts and has annexed a certified copy of the judgment and order dated March 7, 2000 passed by the learned Additional Sessions Judge, Rajkot, in Criminal Revision Application No.78 of 1999. It is stated in the affidavit that the above Criminal Revision Application was filed by the petitioners and the Company against the order of the learned Magistrate rejecting the application filed under Section 245(2) of the Code. It is further stated in the affidavit that the learned Additional Sessions Judge has given cogent and convincing reasons for rejecting the Criminal Revision Application filed by the petitioners and the Company for dropping of the proceedings. The judgment and order dated March 7, 2000 passed learned Additional Sessions Judge, Rajkot, in Criminal Revision Application No.78 of 1999, makes it abundantly clear that the learned Additional Sessions Judge has found that all the necessary requirements of serving notices to the petitioners are satisfied and the ingredients of offence under Section 138 read with section 141 of the Act were made out and, therefore, it was not a fit case for dropping of the proceedings. It is, therefore, submitted by the learned advocate for the respondent No.2-original complainant that, when the petitioners had approached this Court for exercise of inherent powers under Section 482 of the Code, by suppressing the fact about having filed an application previously for dropping of the proceeding, they are not entitled to discretionary relief and, therefore, the application deserves to be dismissed.

In support of the above submission, the learned advocate for the respondent No.2 has placed reliance on the judgment of this Court in the case of Akshar Share Services Private Limited and another vs. State of Gujarat and another, reported in 1998 (2) GLH 483. The learned advocate for the respondent No.2 has further submitted that all the ingredients of Section 138 read with Section 141 of the Act have been made out and the contentions raised in the application relate to the defence, which can be only led when the parties go to trial.

5. The petitioners have filed this application by invoking inherent power vested in the High Court under Section 482 of the Code. Inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Inherent power has its roots in necessity and its birth is coexistence with necessity. the 'inherent power' of a court is that which is necessary for the proper and complete administration of justice and such power is resident in all courts of superior jurisdiction and essential to their existence. In my view, exercise of inherent power is purely discretionary. A person, who approaches the Court to get a discretionary relief, must come with clean hands and by disclosing all material facts before the Court. The party, who invokes the extraordinary inherent jurisdiction of High Court under Section 482 of the Code, is supposed to be truthful, frank and open. He must disclose all the material facts without any reservation even if they are against him. He cannot pick and choose the facts he likes to disclose and to suppress or not to disclose other facts. if material facts are suppressed or distorted, the very functioning of the courts and exercise of inherent jurisdiction would become impossible.

6. Admittedly, the above fact of having filed an application for dropping of the proceeding in the lower court, has been, with deliberate intention, suppressed by the petitioners in the present application with a view to get orders in their favour. Therefore, in my view, when the petitioners have not come with candid facts and clean hands, they cannot hold a writ of the Court with the soiled hands. Suppression or concealment of material facts is not an advocacy. It is a jugglery, which has no place in the discretionary and inherent jurisdiction. if the petitioners do not disclose all the material facts fairly and truly, but state them in a distorted manner with a view to mislead or deceive the Court, the Court

has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi.

7. The reliance placed on the decision of the Apex Court in the case of K.P.G. Nair (supra), will have no application to the facts of the present case, because, in the complaint, it was specifically alleged that, after the cheque was returned, statutory notices were served on all the accused persons which were returned with an endorsement 'unclaimed'. After the summons were issued against the petitioners, they had moved the application in the Court of the learned Magistrate on February 6, 1999 under Section 245(2) of the Code for dropping of the proceedings, which came to be dismissed on April 19, 1999. Against the said order of the learned Magistrate, the Criminal Revision Application was filed in the Sessions Court, Rajkot, which was also ultimately dismissed by the learned Additional Sessions Judge. After dismissal of the said Criminal Revision Application, the present application is filed under Section 482 of the Code on May 9, 2000 by suppressing the fact that earlier application filed for dropping of the proceedings was dismissed. It is borne out from the record that the petitioners are interested in prolonging the criminal proceeding filed against them by taking out a defence that the complaint does not disclose the ingredients of the offence and it is not alleged in the complaint that they were responsible for the conduct of the business of the Company. At the stage of quashing of the complaint, the Court is not required to look into the defence raised by the petitioners. The defence raised by the petitioners that they are sleeping partners in the Company requires a detailed investigation and that question can only be decided at the trial. The grounds stated in the application involve disputed questions of fact, which cannot be gone into by this Court in the inherent exercise of its powers. It is the settled principle of law that the court should be at loath in exercise of powers under Section 482 of the Code, and such powers should be exercised in the rarest of rare cases.

8. As a result of foregoing discussion, I do not find any substance in this application and this application is dismissed. Rule is discharged. The interim relief stands vacated.

April 26, 2002 (M.H. Kadri, J.)

9. After pronouncement of the judgment, the learned advocate, Mr. A.D. Shah, for the petitioners, has

requested to extend the interim relief which was granted earlier, since the petitioners wanted to approach the higher forum. The learned advocate, Mr. K.B. Anandjiwala, appearing for the respondent No.2, has strongly objected to extension of the interim relief.

10. Having regard to the facts and circumstances of the case, the interim relief, which was granted earlier, is ordered to continue for a further period of eight weeks from today.

April 26, 2002 (M.H. Kadri, J.)

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(swamy)